

AGENDA SUMMARY PAGE
CITY COUNCIL MEETING OF: DECEMBER 5, 2007

DEPARTMENT: CITY ATTORNEY**DIRECTOR: BRADFORD R. JERBIC**☒ **Consent** ☐ **Discussion****SUBJECT:**

Approval of continued funding of Harrison, Kemp & Jones to represent the City of Las Vegas in an arbitration filed against it by Asphalt Products Corporation regarding construction of Washington Buffalo Park Phases 1-A and 1-B in an amount not to exceed \$800,000 - Ward 4 (Brown)

Fiscal Impact☐**No Impact**☒**Augmentation Required**☐**Budget Funds Available****Amount:** \$800,000**Funding Source:** General Fund**Dept./Division:** City Attorney**PURPOSE/BACKGROUND:**

Asphalt Products Corporation (APCO) contracted with the City to construct Washington Buffalo Park Phases 1-A and 1-B December 17, 2003. APCO constructed the park and City staff found the construction to be defective. APCO demanded that the City pay millions of dollars in addition to the contract price. City staff refused. APCO filed for arbitration in December 2005. The arbitration commenced September 5, 2007 and, to date, APCO has spent 15 days attempting to prove its case seeking \$7 million. The City has not yet had an opportunity to rebut APCO's case, or prove its asserted counterclaims for millions of dollars. The City Council has previously authorized funding in an amount of \$1.5 million. Consultant, expert witnesses, testing, printing, arbitration, related expenses, and attorneys' fees now exceed \$1.4 million.

RECOMMENDATION:

Approval

BACKUP DOCUMENTATION:

None

Motion made by GARY REESE to Approve

Passed For: 5; Against: 0; Abstain: 1; Did Not Vote: 0; Excused: 1

RICKI Y. BARLOW, LOIS TARKANIAN, GARY REESE, STEVE WOLFSON, STEVEN D. ROSS; (Against-None); (Abstain-OSCAR B. GOODMAN); (Did Not Vote-None); (Excused-LARRY BROWN)

NOTE: MAYOR GOODMAN disclosed that he would be abstaining because he has a small partnership interest with some of the people associated with this item.

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Minutes:

SENIOR LITIGATION COUNSEL WILLIAM HENRY summarized the two-year ongoing action brought by APCO. Defense of that action has required the City to hire outside counsel whose senior partners each have 30 years of specialized practice. In addition to counsel, the City has retained expert consultants regarding forensic engineering and critical path analysis. The forensic engineering expert has identified the defects to be even worse than those identified by staff. As a result of the very expensive and protracted discovery as well as APCO's lengthy presentation, the two-session arbitration is being expanded to a third session and perhaps even a fourth. Initially APCO was seeking \$7 million in compensation and has indicated that they will seek reimbursement for attorney fees and costs which staff estimates at \$2 million. The initial estimate for City costs related to this arbitration was \$1 million. This additional allocation will bring the current total to approximately \$1.4 million.

COUNCILMAN WOLFSON discussed with SENIOR LITIGATION COUNSEL HENRY why APCO was allowed to continue bidding on projects when staff found them to be other than "responsive and responsible". He further questioned why the City had to seek outside counsel. SENIOR LITIGATION COUNSEL HENRY explained that in-house counsel did not necessarily have the expertise, certainly not to the degree of the counsel retained, and using in-house counsel would have required hiring outside counsel for the other work that in-house counsel could not perform while committed to this single arbitration.

COUNCILMAN WOLFSON and COUNCILWOMAN TARKANIAN urged that the City learn from its mistakes and make adjustments to avoid this type of situation in the future. That could include hiring in-house counsel with this type of expertise. COUNCILMAN REESE pointed out that the City needs to proceed based on its current position, even though this is the third request for allocation and there is no guarantee of prevailing.

COUNCILMAN BARLOW confirmed with SENIOR LITIGATION COUNSEL HENRY that this allocation will probably take the City through the third arbitration session and possibly into the fourth, but it is possible that additional funds will have to be requested. COUNCILWOMAN TARKANIAN noted that not funding the defense would cost the City far more. SENIOR LITIGATION COUNSEL HENRY agreed, adding that it could also encourage APCO to file a separate lawsuit for attorney fees and costs despite the contract provision that prohibits seeking those costs as a result of arbitration of the contract.

COUNCILWOMAN TARKANIAN suggested taking more time in making decisions regarding building parks and other large developments might avoid this type of situation in the future.

CHARLIE KAJKOWSKI, Director of Public Works, responded to an earlier question regarding two other projects APCO has with the City. CITY ATTORNEY JERBIC explained that the Council decided to allow APCO to bid on another project. Although they were not awarded that bid, they continued to bid and were ultimately the prevailing bid on two other contracts. COUNCILMAN ROSS explained that the first time APCO attempted to bid after the tennis court issue, which is the subject of the arbitration, the Council allowed their bid to go forward so as to not delay the project and lose the SNPLMA allocation funding the project.

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MAYOR PRO TEM REESE stressed that the Council needed to continue to support the team fighting in this arbitration. However, it is imperative that the City does not allow this to happen again. The City needs to find a better way to cover itself.

